Supreme Court, U.S.
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No. 93-400

IN THE
**Supreme Court of the United States**
**October Term, 1993**

NEW YORK CITY TRANSIT AUTHORITY,
*Petitioner,*

-against-

BERNARD McCUMMINGS,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

# BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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33 pp

## Counter-Statement of Questions Presented

1. Does this Court have jurisdiction to review a personal injury judgment which the New York State Court of Appeals upheld on the ground of "common law negligence" that is "governed ... by the common law of this State?" (Petition for Writ of Certiorari - hereafter "Pet." - at 2a, 4a).

2. Does this Court have jurisdiction to hear Petitioner's contention that the State court decision deprived it of due process of law when that contention was not raised below, was not decided by the State court, and is raised in this Court for the first time?

3. Does this case present an appropriate vehicle to clarify *Tennessee v. Garner*, 471 U.S. 1 (1985), since the State court did not consider that decision in deciding this case?

## TABLE OF CONTENTS


Counter-Statement of Questions Presented . . . . . i

Table of Contents . . . . . iii

Table of Authorities . . . . . v

Counter-Statement on Jurisdiction . . . . . 1

Counter-Statement of the Case . . . . . 2

I. The Facts . . . . . 2

II. Prior Proceedings . . . . . 3

Summary of Argument . . . . . 5

Reasons to Deny the Writ . . . . . 5

I. This Court Lacks Jurisdiction to Review a State Court Decision Based Entirely Upon State Common Law. . . . . 5

II. This Court Lacks Jurisdiction Because Petitioner's Due Process Claim Was Not Raised or Decided Below. . . . . 11

III. This Case Does Not Present an Appropriate Vehicle for Clarification of *Garner*. . . . . 14

Conclusion . . . . . 17

Appendix A
Excerpts From Motion for Reargument
in New York State Court of Appeals . . . . . 1a

Appendix B
Affirmation in Support of Motion for Stay
of Enforcement of Judgment . . . . . 3a

## TABLE OF AUTHORITIES

*Cases:*


Beck v. Washington,
369 U.S. 541 (1962) . . . . . 10, 13, 14

Brinkerhoff-Faris Trust Co. v. Hill,
281 U.S. 673 (1930) . . . . . 13

Flamer v. City of Yonkers,
309 N.Y. 114 (1950) . . . . . 8, 11

Fletcher v. State of New York,
15 Misc.2d 1014 (Ct. of Clms. 1959),
*aff'd.*, 9 A.D.2d 862 (4th Dept. 1959) . . . . . 8

Griffin v. Hilke,
804 F.2d 1052 (8th Cir. 1986) . . . . . 15

Herndon v. City of New York,
43 A.D.2d 634 . . . . . 11

Krueger v. Fuhr,
991 F.2d 439 (8th Cir. 1993) . . . . . 15

McCarthy v. City of New York,
96 N.Y.S.2d 210 (S.Ct. Bx.Co. 1947),
*aff'd.*, 273 A.D. 945 (1st Dept. 1948),
*lv. to app. den.*, 273 A.D.2d 1007
(1st Dept. 1948) . . . . . 8

Pickard v. Connor,
404 U.S. 270 (1971) . . . . . 14

Raley v. Ohio,
360 U.S. 423 (1959) . . . . . 14

Tennessee v. Garner,
471 U.S. 1 (1985) . . . . . *passim*

Ungar v. Sarafite,
376 U.S. 575 (1964) . . . . . 13

Estate of Wilson v. Aiken Industries Inc.,
439 U.S. 877 (1978) . . . . . 13, 14

*United States Constitution:*
Fourth Amendment . . . . . 1, 6, 8, 14, 15

*Statutes:*
28 U.S.C. §1257 . . . . . 1
42 U.S.C. §1983 . . . . . 6

*Other Authorities:*
Public Law 100-352 . . . . . 1

*Kelner & Kelner,* Damages for Unreasonable
Police Force During Arrest, N.Y.L.J.
4/29/93, p. 3, col. 1-3 . . . . . 8

*Prosser & Keeton,* Torts (5th Ed.) §26 . . . . . 11

*Stern & Gressman,* Supreme Court Practice 4, 11, 12

2 C Warren's Negligence, §1.01(2) . . . . . 11

## COUNTER-STATEMENT ON JURISDICTION[1]

Petitioner's first "Question Presented" asserts a conflict between this Court's decision in *Garner, supra,* and the State Court of Appeals' decision in this case (Pet. at i). This case, however, did not go to trial as a Fourth Amendment claim and the New York Court of Appeals, affirming the judgment for respondent under the State's common law of negligence, thought *Garner* irrelevant. There is presented, therefore, no substantial federal question under 28 U.S.C. §1257(a).

Petitioner's second "Question Presented" also fails to properly raise a substantial federal question under 28 U.S.C. §1257(a), because the claim that the State court's decision deprived Petitioner of due process of law is being made for the first time before this Court, though Petitioner had ample opportunity to raise the contention below.

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1. Petitioner contends this Court has jurisdiction under "28 U.S.C. §1257(3)" (Pet. at 2). However, 28 U.S.C. §1257 does not contain any numbered subdivisions, such having been removed in 1988. *See* Public Law 100-352. The substance of the repealed subdivision (3) is now in 28 U.S.C. §1257(a), and respondent will assume that Petitioner is contending that that provision gives this Court jurisdiction over this case.

## COUNTER-STATEMENT OF THE CASE

### I. The Facts[2]

On June 28, 1984, at approximately 8 P.M., Jerome Sandusky entered the 96th Street Station of the Eighth Avenue subway. As he walked down the first staircase (PL 5) toward the southbound platform, he passed a youth (Woods) standing at the top of the staircase and when he reached the landing, he saw two more youths crouched in the far corner. One of these youths (Wise) grabbed him and held him around the neck while the other (McCummings) went through his coat pockets. Sandusky began calling for help (Sandusky: 317-19, McCummings: 897).[3]

Transit Authority (TA) Officers Manuel Rodriguez and Christine Mead were entering the 96th Street Station when they heard Sandusky's calls for help (Mead: 138; Rodriguez: 1517). As the officers approached the staircase with their guns drawn, Woods yelled "Yo" (McCummings: 897; *cf.* Mead: 219). At that point Wise and McCummings ran down the other staircase (PL 6) (Sandusky: 353; Carrera: 491; McCummings: 897; Plaintiff Exhibit [hereafter PX] 4: 1995). Rodriguez came around the corner on

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2. Since respondent prevailed at trial, both of the State appellate courts properly reviewed the evidence in the light most favorable to respondent. See Pet. at 2a, 5a, 19a, 29a-30a. Petitioner, on the other hand, recites the facts as though respondent had *lost* (Pet. at 6-9). The two most egregious examples are Petitioner's assertions that Officer Rodriguez saw respondent participating in the commission of some crime and that Rodriguez shouted a warning before he fired (Pet. at 3, 7-9). Respondent will state the facts as he presented them to the jury which found in his favor.

3. Numerical references are to the Appendix submitted by Petitioner to the State Court of Appeals.

the landing and shot McCummings, who was at the bottom of the staircase (PL 6) in the back (Sandusky: 344-5, 357-8; McCummings: 897).

Based on the foregoing, the jury unanimously found that Rodriguez unjustifiably used deadly force when he shot McCummings in the back (1949, 1951-2, 2088).

## II. Prior Proceedings

The Supreme Court of the State of New York, Appellate Division, First Department, affirmed the jury's verdict, noting that "the jury ... clearly accept[ed] ... McCummings' account of the incident" (Pet. at 19a), i.e., that Rodriguez gave no warning and did not see what role, if any, McCummings had in the attack on Sandusky.

The New York State Court of Appeals affirmed the Appellate Division, expressly stating that "the crucial fact [was] that the most favorable view of the evidence for plaintiff is that Officer Rodriguez *did not see a mugging* and did not know whether a violent crime had been threatened or committed" (Pet. at 5a; emphasis in original).

The State Court of Appeals also held that this was a case of "common law negligence," to be decided "by the law of this State" (Pet. at 2a, 4a). This unexceptional statement provoked a motion for reargument by Petitioner. This motion asserted that the case had not been tried as a negligence case and that the Court of Appeals had violated its own precedents by affirming on a theory differing from that on which the case had been tried. However, there is one thing the motion did *not* contain: any claim that the Court of Appeals' holding -- that this was a common law negligence case -- had deprived Petitioner of "due process

of law" (Appendix at 1a). The motion was unanimously denied (Pet. at 61a).

Next, Petitioner sought a stay from the Court of Appeals; this document also contained no claim that Petitioner had been denied "due process of law" (Appendix at 3a). The request was denied.[4]

Finally, Petitioner sought a stay from this Court. For the first time, Petitioner alleged a deprivation of due process of law -- and this was only done in an *exhibit* (Exhibit H) to the stay application. The stay was referred to Associate Justice Clarence Thomas, and was summarily denied on July 28, 1993.[5]

The petition for a writ of certiorari was filed on September 1, 1993.

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4. The denial was orally issued by then-Acting Chief Judge Richard Simons and, pursuant to Court of Appeals' practice, was not reduced to writing.

5. The stay application was accompanied by a "draft" of the petition for a writ of certiorari, which set forth all of the arguments contained in the petition actually filed (Exhibit H to Application for Stay in United States Supreme Court).

Since Justice Thomas was aware of the precise claims Petitioner was making, his summary denial of the stay is an even stronger than usual indication of the lack of merit in those claims. *Stern & Gressman,* Supreme Court Practice, §17.19.

Petitioner has omitted any reference to its stay motion and the denial of that motion from its recitation of the prior proceedings in this case (Pet. at 14).

After the stay was denied, Petitioner paid the judgment to respondent.

## SUMMARY OF ARGUMENT

1. The State court's holding, that this case involved "common law negligence" and was "governed ... by the common law of this State," presents no federal question and this Court consequently lacks jurisdiction to review that decision.

2. Petitioner's claim that the above holding deprived it of due process of law was never made in any State court, and is being made for the first time in this Court. Petitioner failed to give the State courts any notice of this claim, and this Court does not have jurisdiction to consider it.

3. This case does not present an appropriate vehicle to clarify the defects Petitioner perceives in *Tennessee v. Garner, supra,* since the State court held *Garner* inapplicable to this case.

## REASONS TO DENY THE WRIT

### I.
### This Court Lacks Jurisdiction to Review a State Court Decision Based Entirely Upon State Common Law.

This Court lacks jurisdiction to review a state court's application of its own law. In this case, the New York Court of Appeals explicitly held that "The theory of [respondent's] case as submitted to the jury was common law negligence ... and ... this is a negligence case governed not by federal law but by the common law of this State" (Pet. at 2a, 4a). That ruling presents no federal question, and this Court consequently lacks jurisdiction to review it.

Petitioner attempts to avoid this conclusion by claiming that the New York Court of Appeals dishonestly labelled respondent's claim one of common law negligence in order to avoid review by this Court of what was really a claim under the Fourth Amendment. There is no dispute between the parties that respondent's complaint contained both a negligence count and a count under 42 U.S.C. §1983 for violation of respondent's rights under the Fourth Amendment. But the Fourth Amendment claim, which would have been controlled by *Garner,* was dismissed by the trial court on the assertion of respondent's trial counsel that the two causes of action were different ways of saying the same thing under State and Federal law, i.e., that Rodriguez's actions were negligent under either or both standards (968-71).

The dismissal of the Fourth Amendment claim occurred just before the end of the trial, which accounts for the numerous references to *Garner* during the trial. It was because of the pendency of that cause of action at the time that respondent submitted his Trial Memorandum and Requests to Charge (Pet. at 64a-74a), and at the time the colloquy cited by Petitioner took place (Pet. at 75a), that *Garner* was referred to as "controlling."

After the dismissal of respondent's Fourth Amendment claim, *Garner* criteria were used as instructive, but that decision was no longer directly involved in this case. The New York Court of Appeals recognized *Garner*'s irrelevance to its decision:

> Defendant cites the Supreme Court's decision in *Tennessee v. Garner* (471 U.S. 1) and argues that that case, in some way, entitled it to a dismissal. But the rule in *Tennessee v. Garner* deals with the protections guaranteed by the Federal Constitution for the *person*

> *being arrested* -- not for the arresting police officer or the municipality. It establishes the minimum standard of care which a police officer must exercise in making an arrest to avoid violation of the arrestee's Fourth Amendment rights. Contrary to defendant's contention, *Tennessee v. Garner* does not create a limitation on plaintiff's right to recover or a shield of immunity for a municipal defendant in a common law negligence action (Pet. 4a; emphasis in original).

In a word, state common law is entitled to give greater protection to a person being arrested than *Garner* demands as a minimum. The Court went on to say that "even if" *Garner*'s constitutional standard were "adopted as the precise standard for common law negligence," a trial would still have been required for such issues as the reasonableness of Rodriguez's belief that "the use of deadly force was appropriate and necessary under the circumstances." *Id.* A more standard formulation of the issue of negligence would be hard to find.

Though Petitioner accuses the New York Court of Appeals of deliberately misstating the nature of respondent's claim, it is significant that neither of the two dissenters, Justices Titone and Bellacosa, saw reason to level such a charge. Surely they would have done so if the court majority was disguising a federal constitutional question as one of common law negligence. Moreover, neither of these Justices dissented from the denial of Petitioner's Motion for Reargument on this (or any other) ground, thereby providing further proof that while they disagreed with the majority, they did not see any fraud in that decision. Professional commentary on the case also

agreed that it was decided under the state's common law of negligence.[6]

Petitioner's imputation of dishonesty to New York's highest court cannot survive the plain fact that the Fourth Amendment claim was dismissed by the trial court and the further fact that the record is replete with references to this as a negligence case. *See, e.g.,* 1687-96 (trial court rules that "I will ... put it to the jury just as we do in any negligence case: Was the defendant negligent ... ?"). *See, also,* 1153-72 (same).

In addition, the numerous references to whether the shooting was "reasonable" or "justified" under the applicable "standard of care" constituted alternative formulations of the burden of proof in a negligence case. *See, e.g.,* 1646-9, 1656-7, 1665-6, 1674-87, 1695-6, 1882-97.[7]

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6. Shortly after the Court of Appeals rendered its decision, the "Trial Practice" column of the New York Law Journal carried a lengthy analysis of this case. The authors, both of whom are leading practitioners and commentators in the negligence field, (a) stated that "[Respondent's] case was based on allegations of common law negligence," (b) noted that "This is not a case of first impression," citing *Flamer v. City of Yonkers,* 309 N.Y. 114 (1950), *McCarthy v. City of New York,* 96 N.Y.S.2d 210 (S.Ct. Bx.Co. 1947), *aff'd.,* 273 A.D.945 (1st Dept. 1948), *lv. to app. den.,* 273 A.D.2d 1007 (1st Dept. 1948), and *Fletcher v. State of New York,* 15 Misc.2d 1014 (Ct. of Clms. 1959), *aff'd.,* 9 A.D.2d 862 (4th Dept. 1959), and (c) concluded that "*McCummings* illustrates ... the application of sound principles of law." *Kelner & Kelner,* Damages for Unreasonable Police Force During Arrest, N.Y.L.J. 4/29/93, p. 3, col. 1-3.

7. It is true that, as Petitioner asserts, during a pre-charge proceeding the trial court said "I am not charging negligence in this case" (Pet. at 11). However, as the context of that remark makes clear (Pet. at 81a), what the court meant was that it would not charge that

*(footnote continued on following page)*

Petitioner points to its failure to assert defenses such as contributory negligence as further support for its claim that this case was not tried on a negligence theory (Pet. at 5, 24-5). The complete answer to this assertion is that Petitioner *did* assert that precise defense at trial:

> FOR A SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE ALLEGED CAUSES OF ACTION OF PLAINTIFF AND IN DIMINUTION OF DAMAGES, DEFENDANT, NEW YORK CITY TRANSIT AUTHORITY, ALLEGES, UPON INFORMATION AND BELIEF:
>
> 10. That whatever injuries or damages the plaintiff may have sustained at the time and place mentioned in the verified complaint, were caused, in whole or part, by the culpable conduct of the said plaintiff, said culpable conduct having contributed thereto.
>
> 11. The amount of damages recovered, if any, shall therefore be diminished in the proportion which the said culpable conduct attributable to the plaintiff, bears to the culpable conduct which caused the said damages (19).[8]

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*(footnote continued from preceding page)*
a violation of Petitioner' guidelines for the discharge of weapons constituted negligence *as a matter of law*. Rather, the court would and did (as set forth above) charge the jury on general principles for deciding whether Rodriguez had been negligent.

8. That Petitioner failed to see or raise other available defenses is a curious reason to criticize the State court.

Whatever Petitioner now says about its failure to raise defenses appropriate to a negligence case, the fact that common law negligence was charged was plain on the face of the pleadings. Respondent's First Cause of Action set forth in his Verified Complaint stated:

> That on June 18, 1984 ... BERNARD McCUMMINGS was carelessly and *negligently* assaulted, battered and shot without justification, and under circumstances which did not justify said actions, by police officer Manuel Rodriguez ... (14-15).

The same notice that negligence was charged was contained in Respondent's Verified Bill of Particulars, at (t): "Defendant, New York City Transit Authority, by its agents, servants and/or employees, was negligent, reckless and careless in ... assaulting, battering and shooting plaintiff under circumstances which did not justify said actions ..." (24) And, as pointed out *supra,* pp. 8-9, there were repeated references to negligence throughout the trial. Whatever the explanation for Petitioner's failure to raise certain defenses, that failure cannot be attributed to lack of notice that negligence was charged.

Finally, Petitioner argues that the State court misinterpreted and misapplied its prior case law distinguishing between battery and negligence (Pet. at 24). The short answer to this is that errors of State law do not provide this Court with jurisdiction because they do not present a substantial federal question. *Beck v. Washington,* 369 U.S. 541, 550-4 (1962).[9]

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9. A slightly longer answer is that Petitioner's argument is based on a false dichotomy. Rodriguez was found to have negligently injured respondent because Rodriguez violated the reasonable standard of care

*(footnote continued on following page)*

Thus, it is clear that common law negligence under New York law was charged, was the only claim remaining when the case was submitted to the jury, and the New York Court of Appeals' decision upheld the jury verdict on that ground. There being no federal question, this Court has no jurisdiction. *See,* in general, *Stern & Gressman,* Supreme Court Practice, §3.19-3.24.

## II.
## This Court Lacks Jurisdiction Because Petitioner's Due Process Claim Was Not Raised or Decided Below.

Petitioner accuses the New York Court of Appeals of rendering a "bogus" decision in an "aggressive exercise of 'new federalism'" intended to "deprive this Court of the power to review its decision." Having insulted the State court's integrity, Petitioner then throws down the gauntlet to this Court, exhorting it not to "surrender its role as the supreme Constitutional decision maker to a State court bent on usurping it ..." (Pet. at 5-6).

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*(footnote continued from preceding page)*
relating to the seizure of fleeing felons. The fact that one of the acts that was involved was volitional no more prevents the ultimate result from constituting negligence than would the fact that a driver of a car intentionally made a turn that led to an accident that injured someone. The issue is whether the *totality* of action was negligent, and the presence of an intentional act in the spectrum of events does not change the legal character of the result. In other words, Rodriguez was negligent for intentionally shooting respondent under circumstances which did not reasonably justify that act. *See, e.g., Flamer v. City of Yonkers,* 309 N.Y. 114; *Herndon v. City of New York,* 43 A.D.2d 634, 635; *Prosser & Keeton,* Torts, §26, at 155-56 (5th Ed.); 2 C Warren's Negligence, §1.01(2), all of which were cited by the Court of Appeals (Pet. at 2a).

This claim has already been answered by the showing above that the jury decided this case on a common law negligence claim so that the New York Court of Appeals' decision was entirely correct. But a further conclusive answer is that a claim of a sham State ground alleged to deny due process, like any other federal question, must first be raised in the *State* courts. *See*, in general, *Stern & Gressman*, Supreme Court Practice, §3.25-3.26. Petitioner had abundant opportunities to raise this issue below, but did not raise it in either its Motion for Reargument or Motion for a Stay, and made no motion to amend the remittitur on this basis. This Court has no jurisdiction to consider this issue.

Rule 21.1(h) states that where review of a State court judgment is sought, Petitioner must specify the stage of the State court proceedings in which the alleged federal question was raised and the manner in which said question was raised and decided; this specification must include quotation from and reference to the specific parts of the record which establish the foregoing. The petition contains not a single reference to how and when the due process issue was raised or decided (*cf.* Pet. at 5-6) for the very good reason that the issue was not raised until Petitioner's unsuccessful application for a stay in this Court.

Since Petitioner is complaining of the action of the State Court of Appeals, it is conceded that no complaint could have been made in the trial, or intermediate appellate, court. However, Petitioner had ample opportunity to raise the issue in the New York Court of Appeals and did not do so. This Court has repeatedly held that, although raising a federal claim for the first time on a petition for rehearing in a State's highest court is generally insufficient, such a procedure will be sufficient where the action of the State court itself gives rise to the

federal claim. *See, e.g., Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673, 677-8 (1930). Here, Petitioner filed a Motion for Reargument and a Motion for a Stay and never once referred to a denial of due process.

A federal claim must clearly be identified as such in the petition for rehearing and/or a motion to amend the remittitur. The State court must be made aware of the federal nature of the claim and reject it as such. *See, e.g., Ungar v. Sarafite,* 376 U.S. 575, 582-3 (1964). The New York Court of Appeals was given no hint that Petitioner claimed a denial of due process and so never addressed such a contention.

The decision denying certiorari in *Estate of Wilson v. Aiken Industries Inc.,* 439 U.S. 877 (1978) is dispositive here. In that case, the Petitioner filed a motion for reargument in the Supreme Court of Pennsylvania, referring to that Court's decision as "a patent miscarriage of justice," but the thrust of that argument was on an alleged misinterpretation of State law. Justice Blackmun's concurrence in the denial of certiorari stated: "In all this, any deprival of federal due process is not suggested in so many words." *Id.* at 878-9.

In the present case, Petitioner argued that the State court, by affirming on a ground purportedly not raised below, "violated its own precedent" (Pet. at 12-13, 23-25). However, the cases are legion that a State court's erroneous interpretation and/or application of State law does not present *any* federal question, much less a substantial one. *See, e.g. , Beck v. Washington, supra.*

Petitioner complained in its Motion for Reargument in the State court that that court's decision was "inherently unjust" (Appendix at 1a). However, just as the words

"patent miscarriage of justice" did not adequately convey a claim of the deprivation of due process in *Wilson*, Petitioner's generalized complaint here does not substitute for some language indicating a due process claim. Nor does anything resembling a claim that due process had been denied appear in Petitioner's application for a stay subsequently submitted to the New York Court of Appeals. Nor, finally, did such a claim appear in any motion to amend the remittitur -- because no such motion was ever made.

Having failed to ever raise the due process claim in the State court, Petitioner may not raise it for the first time in this Court. *Raley v. Ohio*, 360 U.S. 423, 434-5 (1959). Contrast *id.* at 435-7. Therefore, this Court has no jurisdiction to hear that claim, *cf. Picard v. Connor*, 404 U.S. 270 (1971), and accordingly, certiorari should be denied. *Estate of Wilson, supra; Beck v. Washington, supra.*

## III.
## This Case Does Not Present an Appropriate Vehicle for Clarification of *Garner*.

Since no Justice on the New York Court of Appeals, neither those in the majority nor those in dissent, decided this case under the Fourth Amendment as interpreted by *Garner*, this case is an utterly inappropriate vehicle for reexamining or clarifying *Garner*. In this posture, review could proceed only if this Court determined that the New York Court of Appeals had dishonestly said it was applying the State's common law, next determined that it had jurisdiction to accept Petitioner's due process contention, despite the fact that it was neither raised nor decided below, and then studied the record to determine whether respondent's evidence, which the jury accepted,

demonstrated a violation of the Fourth Amendment. All of this would have to be done, of course, without the benefit of any interpretation of *Garner* by the court below. A less appropriate vehicle for a decision on a constitutional issue can hardly be imagined.

If this were not enough to require the denial of the writ of certiorari, Petitioner's asserted "conflict" among the lower federal courts is a figment of Petitioner's imagination. Each of the cases cited by Petitioner turns on its particular facts.[10] In none of these cases has a court expressed the slightest difficulty with the application of this Court's decision in *Garner*. Rather, it is only because of Petitioner's incorrect understanding of *Garner* that these cases are cited as confused and/or in conflict.[11]

If *Garner* were involved here, and it most definitely is not, it would still not be true, as Petitioner asserts, that the New York State Court of Appeals held that *Garner* "barred a police officer from using deadly physical force for the sole purpose of capturing a fleeing felon, no matter how violent or heinous the felony from whose commission the

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10. In respondent's submissions to both of the State appellate courts, the federal cases cited by Petitioner were distinguished as involving different factual situations.

11. In fact, two of the cases cited by Petitioner as in conflict with each other are from the *same* court. *See, Krueger v. Fuhr,* 991 F.2d 439 (8th Cir. 1993) and *Griffin v. Hilke,* 804 F.2d 1052 (8th Cir. 1986). The fact that the later case did not cite or distinguish the earlier case, and that no *en banc* decision was rendered, establishes that there was, in fact, no conflict. It should also be noted that, although certiorari has been sought and denied in a number of the cases cited by Petitioner (a fact omitted from Petitioner's citations to these cases), in none of the certiorari petitions has a claim of conflict and/or confusion been raised.

Finally, that this Court has *denied* certiorari in every post-*Garner* case cited by Petitioner is powerful evidence that the conflicts and/or confusion alleged by Petitioner do not, in fact or law, exist.

criminal was fleeing" (Pet. at 3; *see, also,* Pet. at 4, 21-3). No such rule is to be found in the State court's opinion. The court stated clearly the criteria it used:

> In deciding the case we must, of course, take the view of the evidence most favorable to the plaintiff. The factual issues were sharply defined: whether Officer Rodriguez came upon the scene during or after the mugging; whether Officer Rodriguez saw any evidence that plaintiff had committed a violent crime; whether, firing from the top of the stairs, Officer Rodriguez hit the unarmed plaintiff in the back and severed his spinal cord while he was running away at the bottom of the stairs or whether Rodriguez hit plaintiff while he was four feet away and lunging at Rodriguez. It was plaintiff's right to have these factual issues decided by the jury. (Pet. at 4a-5a).

Even if it were assumed that the court was applying *Garner* rather than New York's common law of negligence, the issues stated refute Petitioner's claim that the New York Court of Appeals framed a flat rule barring the use of force to capture a fleeing felon under any circumstances.

The jury found, and the appellate courts affirmed, that Rodriguez did not see what, if any, crime had been committed against Sandusky, did not see what, if any, role respondent had in any such crime, knew respondent was unarmed, gave no warning, and attempted no alternative before he shot respondent in the back and rendered him a helpless paraplegic. These facts rendered Rodriguez's actions unreasonable under *any* interpretation of *Garner.* That alone would make this case the worst possible occasion for the reexamination of *Garner.*

Respondent has discussed this point only out of an abundance of caution. The real and sufficient reasons the petition should be denied are that, this being a common law negligence case, there is no federal question presented, and the due process claim, which Petitioner attempts to present to this Court, was not raised or decided below. For both of those reasons, this Court lacks jurisdiction to grant the writ.

## CONCLUSION

The petition for a writ of certiorari should be DENIED.

Dated: New York, NY
October 22, 1993

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# APPENDICES

## Appendix A
## Excerpts From Motion for Reargument in New York State Court of Appeals

*The inconsistent and unfair treatment the Authority has received in the First Department and in the Court of Appeals*

The Authority has received inconsistent treatment on this issue. The Appellate Division, refusing to consider the Authority's argument that *Garner* should not be applied retroactively, held that *Garner* must be applied as the parties had effectively charted their own course. In fact, the Appellate Division's opinion has since been cited, in conjunction with such decisions as *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1985), to support the proposition that an Appellate Court will not review an alleged charge error to which neither party objected. See: *Schwartz v. Cross Bay Excavators, Inc.*, _____ A.D.2d _____, _____ N.Y.S.2d _____, N.Y.L.J., 4/16/93, p.33, col.1-2, (2nd Dept. 1993).

In stark contrast, this Court has chosen to ignore the fact, amply illustrated above, that *Tennessee v. Garner* was deemed applicable by plaintiff, defendant and the trial justice at the trial of this action. Instead, it has analyzed this case as though a charge had been sought or given, as it never was, on *negligence*.

Thus, the Authority could not have its arguments *against* the application of *Garner*, as fundamental error, heard in the First Department because it had charted its own course, in conjunction with plaintiff, at trial. In the Court of Appeals, it cannot have its arguments heard as to the proper interpretation of *Garner*, as if no course had

*Appendix A*
*Excerpts From Motion for Reargument*
*in New York State Court of Appeals*

been agreed upon at trial. This is inherently unjust. For all intents and purposes, the Authority has been denied the appellate review which it is the duty of this Court to provide. The Court of Appeals should rectify its error and review this case and the law charged to the jury as controlling: *Tennessee v. Garner* and Penal Law §35.30.

**Appendix B**
**Affirmation in Support of Motion for Stay of Enforcement of Judgment**

COURT OF APPEALS - STATE OF NEW YORK

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BERNARD McCUMMINGS,
*Plaintiff-Respondent,*

-against-

NEW YORK CITY TRANSIT AUTHORITY,
*Defendant-Appellant.*

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LAWRENCE HEISLER, an attorney duly admitted to the practice of law in the courts of this State, affirms the following under the penalties of perjury, pursuant to CPLR 2106:

1. I am associated with ALBERT C. COSENZA, attorney for defendant-appellant, New York City Transit Authority ("Authority"), and I submit this affirmation in support of the Authority's motion for an order pursuant to CPLR 2201 and 5519(c) staying enforcement of a judgment (see Exhibit "A") of the Supreme Court, New York County, entered on March 8, 1990, in favor of plaintiff, Bernard McCummings, in the total sum of $4,343,721.24, pending resolution of such further proceedings as may be taken pursuant to 28 U.S.C. §2101.

2. Plaintiff forcibly mugged an elderly passenger on a subway platform and was shot by an Authority police officer while attempting to flee the scene of the crime. He brought suit against the Authority to recover for the

physical injuries he sustained, claiming that excessive force had been used to effect his arrest.

3. The jury was charged on the principles enunciated in *Tennessee v. Garner,* 471 U.S. 1 (1985) and of New York's justification statute, Penal Law §35.30. A verdict awarding substantial damages was returned in plaintiff's favor, and the Authority appealed to the Appellate Division, First Department, arguing among other things that on the undisputed facts -- plaintiff was convicted on a guilty plea of robbery in the second degree, a Class "C" felony (Penal Law §160.10) -- the police officer used reasonable force as a matter of law in preventing plaintiff's escape. Although that court took note of plaintiff's admission "that he was engaged in robbing and beating" his victim, it affirmed the judgment entered on the jury's verdict. *See McCummings v. New York City Transit Authority,* 177 A.D.2d 24 (1st Dept. 1992).

4. In a memorandum decision dated April 5, 1993, this Court affirmed the order of the Appellate Division, holding that the reasonableness of the officer's conduct presented issues of fact that, on principles of common law negligence, were properly submitted to and resolved by the jury. *See McCummings v. New York City Transit Authority,* 81 N.Y.2d 923 (1993).

**The Authority's Reargument Motion**

5. Notwithstanding this Court's apparent belief to the contrary, principles of common law negligence were not charged to the jury and thus, self-evidently, played no role

whatsoever in the jury's finding of liability. Indeed, it would have been fundamental error to charge negligence principles, even had the parties requested that the trial court do so, since the gravamen of the action was the alleged use of excessive force -- i.e., the intentional tort of battery.

6. The court's affirmance of the judgment on a theory of liability never raised at trial and never passed on by the jury, a theory which on any view of the facts had no application to the case, prompted the Authority to move by notice of motion dated April 30, 1993, for reargument of the appeal. By order dated July 8, 1993 the court denied the Authority's reargument motion.

**Stay of Enforcement of Judgment**

7. The Authority strongly believes that this lawsuit raises important federal questions regarding the meaning of *Tennessee v. Garner* (471 U.S. 1) and the circumstances under which a police officer may fire a weapon to capture a fleeing felon.

8. The Authority is aware that the majority concluded that the suit we submit to the jury on a theory of common law negligence and thus implicated no federal issues.

9. The majority's characterization is open to challenge and does not bind the U.S. Supreme Court (*see Wolfe v. North Carolina*, 364 U.S. 177 (1960); *NAACP v. State of Alabama*, 357 U.S. 449 (1958)). After reviewing the record,

*Appendix B*
*Affirmation in Support of Motion for Stay of Enforcement of Judgment*

the Supreme Court may conclude as did the dissenters, that the Authority's appeal did raise substantial federal questions.

10. The Authority is mindful that plaintiff has waited for some time to collect damages that he believes are rightfully owing him. Nevertheless, the Authority in defending against plaintiff's suit, and in appealing the adverse judgment, was not simply stalling. It was raising important issues of public policy that ultimately divided the members of this court.

11. The stay the Authority is seeking is a relatively short one. Although the rules of the United States Supreme Court provide that the Authority has 90 days from the July 8th date on which the court denied its motion for reargument (*see* Supreme Court Rule 13.4), the Authority is merely asking for a 30-day stay. The Authority by that time will have served and filed its petition for certiorari and can apply directly to the Supreme Court for an additional stay.

12. A short stay can hardly prejudice plaintiff. As it is, even had the Authority not contemplated a further appeal of this suit, it would take approximately three to six weeks to process payment of the judgment. There are substantial liens in this case which must be pinpointed and satisfied as part of the payout on this judgment.

13. Moreover, a dispute has arisen over the payment of the attorney's fees owed to the original attorney of record in this case, Morris P. Eisen. Mr. Eisen has given a

security interest in his share of the attorneys' fees to Citibank to secure a pre-existing loan. (*See* annexed Exhibit "C" - Citibank letter, and Exhibit "D"). Citibank insists that it be paid Eisen's share of the fee immediately, something the Authority would rather not do without a directive from a court shielding it from any possible liability to Mr. Breitbart, plaintiff's trial counsel. Mr. Breitbart, however, insists that all funds be turned over to him (see Exhibit "D"). Moreover, it is unclear whether Mr. Eisen, now disbarred, may lay claim to any portion of the attorney's fees. Thus, even in the absence of the Authority's petition for certiorari, plaintiff and his trial counsel, David Breitbart, could not reasonably anticipate payment of the entire judgment in less than 30 days.

14. In short, the 30-day stay the Authority is asking for will not necessarily result in any greater delay in the payment of plaintiff's judgment.

15. By contrast, if the Authority is denied a stay, it may be stymied from seeking higher review of this court's decision. To begin with, there is no guarantee that Mr. McCummings, who will be getting the bulk of the proceeds, will preserve his funds while the Authority pursues further appeals. Moreover, if plaintiff should decide to execute, the sheriff will be entitled to substantial fees, in the neighborhood of perhaps $250,000.

**Other Stay Proceedings**

16. The Authority has applied for a stay of enforcement proceedings in Supreme Court, New York

*Appendix B*
*Affirmation in Support of Motion for Stay of Enforcement of Judgment*

County. That stay application is not directly related to the stay proceedings now before this court. In Supreme Court the Authority asked for a stay of execution because of a conflict over a portion of the attorney's fees between Mr. Breitbart, plaintiff's trial counsel and Morris Eisen, plaintiff's attorney of record. Supreme Court Justice Stewart Cohen has denied the Authority's request for interim relief and the motion itself will be heard on Friday, July 23, 1993.

17. The Authority would have moved to stay execution on that ground even had it not been contemplating seeking certiorari.

18. By contrast, the Authority would still be asking this Court for a stay, even if there were no dispute about the fee. As the Court knows, before the United States Supreme Court will entertain the Authority's application for a stay, the Authority must first apply to this Court.

19. For all these reasons, we respectfully request that this Court issue a short stay pending the filing of the Authority's petition for certiorari.

WHEREFORE, defendant-appellant requests that its motion be granted in all respects.

Dated: Brooklyn, New York
July 20, 1993

LAWRENCE HEISLER